Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

Jonna Sue Castaneda,
(OI File No. H-13-42526-9),

Petitioner,

v.

The Inspector General

Docket No. C-14-1160

Decision No. CR3607

Date: January 29, 2015

DECISION

Petitioner, Jonna Sue Castaneda, asks review of the Inspector General's (I.G.'s) determination to exclude her for five years from participation in the Medicare, Medicaid, and all federal health care programs under section 1128(a)(3) of the Social Security Act. For the reasons discussed below, I find that the I.G. is authorized to exclude Petitioner, and that the statute mandates a minimum five-year exclusion.

Discussion

The sole issue before me is whether the I.G. has a basis for excluding Petitioner from program participation. Because an exclusion under section 1128(a)(3) of the Act must be for a minimum period of five years, the reasonableness of the length of the exclusion is not an issue. Act § 1128(c)(3)(B); 42 C.F.R. § 1001.2007(a)(2).

The parties have submitted their written arguments (I.G. Br.; P. Br.), and the I.G. filed a reply. With his brief, the I.G. submitted five exhibits (I.G. Exs. 1-5); Petitioner submitted

six exhibits (P. Exs. 1-6). In the absence of any objections, I admit into evidence I.G. Exs. 1-5 and P. Exs 1-6.

I directed the parties to indicate in their briefs whether an in-person hearing would be necessary, and, if so, to "describe the testimony it wishes to present, the names of the witnesses it would call, and a summary of each witnesses' proposed testimony." I specifically directed the parties to explain why the testimony would be relevant. Ruling and Order at 2 ¶ 3, Attachment 1 (Informal Brief of Petitioner ¶ III) and Attachment 2 (Informal Brief of I.G. ¶ III) (September 29, 2014). The I.G. indicates that an in-person hearing is not necessary. Although Petitioner does not directly respond to the question, she does not contend that an in-person hearing is necessary and lists no potential witnesses. I therefore conclude that an in-person hearing is not required.

Petitioner must be excluded for five years because she was convicted of felony fraud in connection with the delivery of a healthcare item or service.[1]

The underlying facts here are not in dispute. Petitioner was a licensed vocational nurse who worked in a Texas nursing home. She kept for herself tablets of the narcotic drug Hydrocodone while claiming to have administered them to the nursing home residents for whom they were ordered. I.G. Ex. 2 at 2-3; I.G. Ex. 3. On September 9, 2013, she pled guilty to two felony counts of knowingly possessing and obtaining a controlled substance by fraud, forgery, or deception, in violation of Texas Health and Safety Code § 481.129. I.G. Exs. 4, 5.

The Texas court accepted Petitioner's plea and entered two separate Orders of Deferred Adjudication against her. I.G. Exs. 4, 5.

In a letter dated February 28, 2014, the I.G. advised Petitioner that, because she had been convicted of a felony offense related to fraud, theft, embezzlement, breach of fiduciary responsibility or other financial misconduct in connection with the delivery of a health care item or service, the I.G. was excluding her from participation in Medicare, Medicaid, and all federal health care programs for a period of five years. I.G. Ex. 1. Section 1128(a)(3) provides that an individual or entity convicted of felony fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service must be excluded from participation in federal health care programs for a minimum of five years. *See* 42 C.F.R. § 1001.101(c). Because Petitioner was convicted of felony fraud in connection with the delivery of health care items (prescription drugs), she is subject to exclusion.

[1] I make this one finding of fact/conclusion of law.

Petitioner does not deny any of the above facts, but points out that she self-reported her misconduct prior to any charges being filed and has since demonstrated that she is a trustworthy nurse. That she has shown herself to be trustworthy is not a basis for overturning a mandatory exclusion.

Petitioner also argues that, because her sentence was "deferred," the charges against her were eventually dismissed, so she was not "convicted." The Departmental Appeals Board (Board) has consistently rejected this and similar arguments and characterizes as "well established" the principle that the term "conviction" includes "diverted, deferred and expunged convictions regardless of whether state law treats such actions as a conviction." *Henry L. Gupton*, DAB No. 2058 at 8 (2007), *aff'd sub nom. Gupton v. Leavitt*, 575 F. Supp. 2d 874 (E.D. Tenn. 2008).

In *Gupton*, the Board explained why, in these I.G. proceedings, the federal definition of "conviction" must apply. That definition differs from many state criminal law definitions. For exclusion purposes, Congress deliberately defined "conviction" broadly to ensure that exclusions would not hinge on the state criminal justice policies. Quoting the legislative history, the Board explained:

> The rationale for the different meanings of "conviction" for state criminal law versus federal exclusion law purposes follows from the distinct goals involved. The goals of criminal law generally involve punishment and rehabilitation of the offender, possibly deterrence of future misconduct by the same or other persons, and various public policy goals. [footnote omitted] Exclusions imposed by the I.G., by contrast, are civil sanctions, designed to protect the beneficiaries of health care programs and the federal fisc, and are thus remedial in nature rather than primarily punitive or deterrent . . . . In the effort to protect both beneficiaries and funds, Congress could logically conclude that it was better to exclude providers whose involvement in the criminal system raised serious concerns about their integrity and trustworthiness, even if they were not subjected to criminal sanctions for reasons of state policy.

Gupton, at 7-8. I agree with the Board's analysis and conclude that Petitioner was convicted within the meaning of the Act.

Conclusion

For these reasons, I conclude that the I.G. properly excluded Petitioner from participation in Medicare, Medicaid, and all federal health care programs, and I sustain the five-year exclusion.

/s/
Carolyn Cozad Hughes
Administrative Law Judge